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BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO 656
MOTOR CARRIER BUREAUS – PERIODIC REVIEW PROCEEDING

REPLY OF NASSTRAC, INC. IN OPPOSITION TO PETITION OF
NORTH AMERICAN TRANSPORTATION COUNCIL, INC.
FOR POSTPONEMENT OF EFFECTIVE DATE

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NASSIRAC, Inc. hereby replies in opposition to the Petition for Postponement of the Effective Date filed June 5, 2007 by North American Transportation Council, Inc. ("NATC"), a regional rate bureau. In its Postponement Petition, NATC seeks an extension of the effective date of the Board's May 7, 2007 Decision in this proceeding from September 4, 2007 to "September 4, 2008, or later."

The current effective date of September 4, 2007 allows a period of 120 days for the bureaus to prepare for termination of their antitrust immunity. This is generous, considering that they have known since this proceeding began that their antitrust immunity could be terminated or conditioned. Most STB decisions take effect within 30 days after service, even if they change established practices in important proceedings.

The extension NATC seeks would preserve its antitrust immunity and their collective ratemaking until at least September 4, 2008, 485 days after the Board's Decision finding antitrust immunity and collective ratemaking contrary to the public interest. This extension is completely unwarranted and NATC's Postponement Petition should be denied.

Like other recent bureau extension requests, NATC's Extension Petition argues that more time would be in the public interest because termination of antitrust immunity as of September 4, 2007 would disrupt decades-old patterns of motor carrier pricing. In fact, denying NATC's Petition will minimize disruption for the shipping public, and for the larger public that depends on the flow of goods transported by member motor carriers: granting its Petition will maximize disruption.

NATC publishes base rate tariffs that are available for use by member carriers as baselines for discounting, and it also develops annual general rate increases (GRIs) that raise the baseline rates subject to discounting.

The existing NATC baseline rate tariffs are not affected by the STB's decision – those rates can be used by shippers and carriers for individual rate negotiations, or they can be cited by NATC member trucking companies (presumably subject to minimum discounts). Similarly, NATC has already adopted its GRI for 2007, effective April 2, 2007. This GRI is also unaffected by the STB's Decision since it was collectively set before the Decision was issued, and long before the Decision's current September 4, 2007 effective date.

Accordingly, for the rest of this year, the NATC baseline rates are known quantities, increased by a known GRI. Arms length negotiations by shippers and carriers, acting individually with no need for antitrust immunity, should control what NATC member carriers charge and what their shipper customers pay absent an extension of the Board's current effective date.

Similarly, the National Motor Freight Classification, like existing rate bureau baseline rate tariffs, will not disappear merely because the Board has decided to terminate antitrust immunity effective September 4, 2007. Shipments can be rated using those tariffs and using the class ratings in the NMFC, just as they were prior to the Board's May 7, 2007 Decision in this proceeding. Indeed, shippers and carriers will be able to continue rating shipments in this way indefinitely, so long as they act individually, without collective action among competitors.

What has changed about this system as a result of the Board's decision is thus not the tariffs and classifications and GRIs in effect today. It is rather the fact that future changes in those baseline rates and commodity classifications will not be immunized from application of the antitrust laws. As a result, many if not most such changes will presumably be made by carriers and shippers acting individually rather than collectively.

If, for example, a carrier member of NATC decides that it wants to increase baseline rates by 3%, or assign a commodity classification to a commodity (new or old) that differs from that commodity's class rating in the NMFC, it can do so, and any shipper customer of that carrier can accept the changes, reject them, or negotiate a compromise.¹

This is, of course, the manner of doing business that applies for all other modes of transportation (and other commercial enterprises) in the U.S. Far from being disruptive, such arrangements preserve the current rate structure that is the product of past collective ratemaking practices, but prevent future abuse of collective ratemaking, as called for by the Board's Decision in this proceeding.

In contrast, for as long as NATC and any other rate bureaus retain antitrust immunity beyond the current effective date of September 4, 2007, the stability of these arrangements will be jeopardized. Not only will NATC be allowed to adopt a GRI for 2008, increasing current baseline rates, but any actions permitted by NATC's current Agreement will be lawful, even if such actions would otherwise violate the antitrust laws. For the reason, NATC's contention (Petition at 4) that the "granting of this petition will have no adverse effect on anyone, shipper or carrier" cannot be credited.

¹ It is true that collectively-set GRIs may end once the Board's Decision becomes effective, but the Board has correctly held that GRIs are anticompetitive and not in the public interest. See Decision at 13. "Further, by serving as a focal point for pricing decisions, use of a collectively-set general rate increase (GRI) promotes a higher market price than would otherwise result."

Multiple GRIs, collective increases of unprecedented size, or other collective actions benefiting carrier members and harming the interests of shippers and the public would be possible, and could be likely, as rate bureaus try to maximize the advantages of antitrust immunity while they still can. It is precisely because of such counterproductive incentives that antitrust immunity is strongly disfavored under American law.

If abuses were not contemplated when these extension requests were prepared (and NASSTRAC does not wish to assume improper motives on the part of the bureaus), NATC could have stated in its Postponement Petition that it would preserve current rate levels during the pendency of the requested extension. However, no such commitment is made.

On the contrary, NATC indicates that an extension of time is needed so that it can help its member carriers develop individual tariffs, including seeking a Business Review Letter from the Department of Justice. But it defeats the purpose of replacing collective carrier action with individual carrier action for the bureaus to manage or advise or assist with the creation of individual tariffs for use by individual members. Moreover, antitrust immunity is not needed to use DOJ Business Review procedures, or warranted if NATC intends to avoid violations.

To the extent that the bureaus intend to influence the "individual" tariffs of their members, antitrust immunity may be needed but should not be provided. To the extent that member carriers develop their own pricing and other terms and conditions of their operations in a truly individual manner, i.e., by acting alone rather than in concert with competitors, no antitrust immunity and no extension of the current effective date is justifiable, because none is need.

If NATC and its members are worried about actions that may fall into gray areas, neither clearly lawful nor clearly unlawful, surely the public interest is better served by denying any extension of time than by granting one. If in doubt, the rate bureaus and their members should consult counsel, or steer clear of questionable activities. Thousands of trade associations and businesses do this routinely.

Any worries about litigation risk do not support the requested extension of time. In this regard, NASSTRAC would ask the Board to take official notice of the Report and Recommendations issued April 2, 2007 by the Antitrust Modernization Commission, and especially Chapter IV, Government Exceptions to Free-Market Competition, and pp. 332-366. See, in particular, pp. 350-351 (footnotes omitted):

The Commission finds two arguments in favor of antitrust exemptions particularly unpersuasive, however. First, no immunity should be granted to create increased certainty in the form of freedom from antitrust compliance and litigation risk. Antitrust compliance and litigation risks are costs of doing business that hundreds of thousands of American businesses manage every day. No particular companies or industries should be specially entitled to avoid these costs; if the costs are unreasonable, broader reform applicable to all businesses is the proper remedy. Second, no immunity should be granted to stabilize prices in order to provide an industry with certainty and predictability for purposes of investment or solvency. This too is a benefit that all industries would appreciate, but that none should be singled out to receive. The costs of price "stability" typically flow to consumers and result in inflexibility that undermines economic growth.

In any event, NATC does not need an extension of the September 4, 2007 effective date to avoid exposure to liability because a simpler and better alternative is available. It can simply suspend collective action on ratemaking that carries a risk of impropriety while analyzing future options. This approach would preserve the present benefits

of the status quo and effectuate the Decision of the Board in this proceeding. As the Board held in that Decision (at 11):

Our termination of approval of bureau agreements should not adversely affect any beneficial bureau activities that may promote the flow of commerce without harming competition – it will merely subject the bureaus to the same antitrust rules that govern the vast majority of industries in the private sector of our economy.

Finally, as with other extension requests filed recently, NASSTRAC is concerned that NATC is seeking such a lengthy extension that its Postponement Petition resembles a motion for a stay pending judicial review, without being styled as such or addressing the relevant standards. NATC has not ruled out a court challenge to the Board's Decision, or a stay request.

NASSTRAC submits that NATC is unlikely to succeed in any challenge to the Board's decision, which is supported by DOJ, DOT, NASSTRAC and NITL and other commenting parties, and is consistent with current trends in antitrust law

NATC has not claimed or established that it would be irreparably harmed absent the requested extension, and it has the ability to operate even after September 4, 2007 so long as it avoids activities that expose it or its members to antitrust liability. In contrast, if its Postponement Petition were granted, NATC could continue for more than a year to engage in collective ratemaking and other activities that, but for immunity, could be illegal, and detrimental to the interests of shippers and the public.

CONCLUSION

NATC has failed to show how it will be harmed if the antitrust laws apply to its activities after September 4, 2007. It has also failed to demonstrate that continuation of

its antitrust immunity until September 4, 2008 or later will not harm the interests of shippers and the public. Accordingly, the NATC Postponement Petition should be denied.

Respectfully submitted,



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Dated: June 11, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of June, 2007, caused copies of the foregoing document to be served by first-class mail on all parties of record.



John M. Cutler, Jr.

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